# No. 15,092

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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CARYL CHESSMAN,
*Appellant,*

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,
*Appellee.*

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**Appeal from the United States District Court for the Northern District of California, Southern Division.**

## APPELLEE'S BRIEF.

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### STATEMENT OF THE CASE.

On December 30, 1954, Chessman filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (CT 1.) Judge Goodman denied the writ on January 4, 1955. (CT 24.) Thereafter a certificate of probable cause was granted and the matter was appealed to this honorable court. This court rendered an opinion which is reported in *Chessman v. Teets,* 221 U.S. 276. Thereafter, a writ of certiorari

was sought and the United States Supreme Court ordered a hearing on the question of fraud and collusion in the settlement of the record. See 350 U.S. 3. (CT 53.)

On November 30, 1955, petitioner's counsel secured the issuance of a writ of habeas corpus returnable December 8, 1955. (CT 55.) A return to the writ was filed on December 8, 1955. (CT 56.) The matter was set for hearing on January 9, 1956. (CT 58.) At the same time the custody of petitioner was transferred to the marshal. Petitioner remained in the state prison and an order was made providing for consultation between petitioner and his counsel. (CT 59.) This order was thereafter amended on December 21, 1955. (CT 100.) Thereafter the trial of the matter was continued on January 10, 1956 and thereafter to January 16, 1956. (CT 122.) The matter proceeded to trial on January 16, 1956, and the trial continued through January 24, 1956. On January 31, 1956 Judge Goodman filed an opinion, findings of fact and judgment ordering the writ discharged and petitioner remanded to the custody of appellee. (CT 204-215.) Notice of appeal was filed on February 7, 1956. (CT 245.) Judge Goodman denied a certificate of probable cause on February 14, 1956. Chief Judge Denman of this court granted a certificate of probable cause on February 27, 1956. Another notice of appeal was filed on February 29, 1956.

Pages one through six of the clerk's transcript contains excerpts from the docket entries in the *Chessman* case from the period of December 30, 1954 to March 12, 1956.

## STATEMENT OF FACTS.

Since petitioner has not attacked the sufficiency of any of the findings of fact, no detailed summary of the evidence produced at the trial will be made.

In 1948 petitioner was convicted of seventeen felonies. Two of the judgments imposed the death penalty. These convictions were affirmed on appeal by the California Supreme Court (*People v. Chessman,* 38 Cal.2d 166, cert. den. 343 U.S. 934, rehearing den. 343 U.S. 937). The court reporter, Mr. Perry, died without having completed his transcript. A substitute court reporter, Mr. Fraser, was employed to complete the transcript.

The substance of the allegations of the petition, which was made the traverse, was that the substitute court reporter, Mr. Fraser, the prosecutor, Mr. J. Miller Leavy, and the trial judge, Judge Fricke, conspired and colluded in the preparation of a fraudulent transcript for the California Supreme Court. Petitioner also alleged that Fraser was incompetent, and an instrument of the prosecutor, and that the notes were undecipherable. Petitioner specifically alleged that on May 21, 1948, the transcription omitted an instruction of the judge which required the jury to bring in a death penalty and that the transcript also omitted a remark of the judge to the effect that the petitioner was the "worst criminal" that had ever been in his court.

The substitute court reporter, Mr. Fraser, the prosecutor, Mr. Leavy, and Judge Fricke, were all produced and examined by petitioner's counsel at the

hearing. Likewise, Mr. Luskin, assistant county clerk in charge of the criminal records, who was at the time of the trial Judge Fricke's clerk, testified. Also, Mr. DeNoia, deputy clerk of the California Supreme Court and Mr. Jones, clerk of the Superior Court of Marin County, testified pertaining to records in their respective courts. Petitioner himself likewise took the stand.

The People produced a Pittman shorthand expert and two of the jurors as their witnesses.

As a result of the testimony of these witnesses the court expressly found that the prosecutor did not engage in any fraud or unlawful conduct in preparing the transcript on appeal in petitioner's case; that the prosecutor did not knowingly or otherwise make any misrepresentations to the trial judge for the purpose of inducing the trial judge to certify, allow or approve the transcript; that the prosecutor made no misrepresentations of any kind to the trial judge as to the accuracy or correctness of the transcript, and further, that it was not true that the transcript prepared by Fraser had been materially or otherwise altered through the connivance of Fraser or Leavy, nor was there any corrupt arrangement between them to prepare a fraudulent transcript.

The court found that the shorthand reporter Perry, was fully competent and physically able at all times to record the proceedings in the Chessman case.

Likewise, the court found that it was not true that the substitute reporter, Fraser, was a discredited reporter for the State of Washington; that it was not

true that Fraser had been discharged at any time for incompetency, drunkenness or for any other cause; that it was not true that Fraser was inebriated or under the influence of alcohol or mentally incapable of such work at any of the times he engaged in transcribing the notes.

The trial court further found that Fraser was especially and exceptionally competent to transcribe Perry's notes and did so with fairness and competence.

The instructions given by the trial judge to the jury on May 21 were accurately and correctly reported in the transcript as prepared by Fraser. The trial judge did not state to the jury that "the defendant is one of the worst criminals I have ever had in my court". (CT 211-213.)

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## ARGUMENT.

### I.

### THE DISTRICT COURT HELD A HEARING AND MADE FINDINGS ON THE ALLEGATIONS OF FRAUD AND CORRUPTION IN THE PREPARATION OF THE TRANSCRIPT FOR THE CALIFORNIA SUPREME COURT.

The decision of the United States Supreme Court in *Chessman v. California,* 350 U.S. 3, ordered a hearing on the question of fraud and corruption in the preparation of the transcript for the California Supreme Court. The trial court has held hearings and made findings on these issues. Appellant does not object to the propriety of the findings that there was no fraud

or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence. It is hoped that the allegations of fraud, corruption and inaccuracy are laid at rest once and for all, even though appellant insists upon repeating these allegations in his present brief.

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## II.

THE CONSTITUTIONALITY OF THE PROCEDURE USED IN THE CALIFORNIA COURTS TO SETTLE THE RECORD, HAS BEEN ADJUDICATED BY THIS COURT AND IMPLIEDLY ADJUDICATED BY THE SUPREME COURT OF THE UNITED STATES IN THE IMMEDIATE PROCEEDINGS, AS WELL AS IN PRIOR DECISIONS. THE PROCEDURES USED IN CALIFORNIA WERE CONSTITUTIONAL AND APPELLANT HAS WAIVED ANY OBJECTION HE MAY HAVE HAD CONCERNING THE LACK OF COUNSEL AT THE PROCEEDINGS TO SETTLE THE RECORD.

The constitutionality of the procedure used in the California courts has been adjudicated as constitutional; the procedures used were proper and in no way violated equal protection of the law. Appellant again contends that he was denied due process and equal protection of the law by the procedure used to settle the record in the State court. He alleges that in the absence of his physical presence the proceedings were fatally defective. There are at least three answers to these contentions.

**A. The constitutionality of the procedures used to settle the record has been adjudicated.**

This court, in the case of *Chessman v. Teets,* 221 Fed.2d 276 at 278, expressly determined that Chessman had waived his right to counsel and was precluded from urging the matter. The United States Supreme Court in 350 U.S. 3 impliedly adjudicated this issue by ordering a hearing solely on the question of fraud and collusion in the settlement of the record. Of course, the United States Supreme Court likewise impliedly approved the procedure used in prior decisions. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, the Supreme Court denied certiorari. (340 U.S. 840.)

In that particular case the United States Supreme Court had the opportunity to pass on all phases of the procedure used in the State court to settle the record.

Policy demands an end to litigation, and we will not assume that the United States Supreme Court intended that after a full hearing to determine the issue of fraud and corruption in the settlement of the record, the issue of the procedure used in the State courts should again be raised in the Supreme Court and thus further impede and stifle the State administration of justice.

**B. The procedure used by the State court did not deny appellant due process or equal protection of the law.**

A state is not required under the due process clause to provide an appellate procedure for review of a criminal trial. (See *Brown v. Allen,* 344 U.S. 443, at 486; *McKane v. Durston,* 153 U.S. 684, at 687.)

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas,* 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook,* 340 U.S. 206 (prison officials prevented the filing of an appeal); *Cole v. Arkansas,* 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman,* 35 Cal.2d 455. This *was and is the law of California.* This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State courts. See note 19 A.L.R.2d 1098. Also see *Dowdell v. United States,* 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law proceedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Augment and Correct Record" in which he requested numerous changes. The trial judge heard the written ob-

jections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination . . . and the same is now, therefore, approved by me . . ." (See *People v. Chessman,* 35 Cal.2d 455, at 459.)

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that the District Judge expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the Deputy District Attorney and no misrepresentation to the trial judge for the purpose of inducing the trial judge to settle the record. The District Judge likewise found that there was no fraud or collusion between the Deputy District Attorney, the substitute reporter, and the judge in the settlement of the record. Furthermore, the District Court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the District Court expressly found that Fraser and Leavy and the trial judge "endeavored to and did complete the transcript in the Chessman case in the best of good faith and with diligence and fairness so that a fair and correct record could be presented to the Supreme Court of California . . ." (CT 211-213.)

Furthermore, as is pointed out by the Supreme Court of California in the decision of *People v. Chessman,* 35 Cal.2d 455 at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the subject on appeal would nevertheless not have been affected. The California Supreme Court in this regard, said as follows:

> "Examination of the record in the light of defendant's claims discloses that it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been any miscarriage of justice. The record is not, as defendant asserts, 'unintelligible' in material part. It clearly shows (and there is no claim that it is insufficient or incorrect in this regard) the substance and the nature of the People's case and the substance and the nature of the defense of Chessman: Victims of the crimes testified for the People that certain criminal acts were committed and identified defendant as the person who committed them (except in one instance, a count of grand theft, where defendant was connected with the crime by evidence that the property was found in his possession); defendant denied that he committed the crimes and witnesses for him testified to alibis for some of them. The record appears to contain ample evidence to support the verdicts and there is no suggestion that this evidence was not actually received at the trial. Appraisal of the sufficiency of the evidence, insofar as any contention of the defendant is concerned, present no problems of gradations of possible states of mind of defendant, but only the questions whether certain behavior (which the People's witnesses testified and the jury believed was behavior of defendant)

constituted kidnapping for the purpose of robbery with bodily harm, first degree robbery, attempts at robbery and rape, violation of section 288a of the Penal Code, and grand theft.

"The asserted 'inaccuracies and omissions in the record' of which defendant complains are as follows: (a) The greater part of defendant's complaints consists of general claims that large portions of the transcript of testimony of witnesses are incomplete or inaccurate. Defendant does not claim that any different and more accurate transcription of the notes would show that the trial Court erroneously admitted or excluded any evidence. Certainly no factual basis is shown, and none is even claimed, for concluding that any erroneously admitted or excluded evidence prejudicially affected the verdicts. Claimed inaccuracies concern conflicting testimony and the credibility of witnesses. Making available to this Court the precise words of every witness would not enable it to upset the jury's determination that the People's witnesses, rather than defendant and his witnesses spoke the truth. As in People v. Botkin (1908), supra, p. 249 of 9 Cal.App., 'Under the condition of the evidence in this case (or any factual variation of the record suggested by defendant) . . . any views that we might have as to the credit that should be given to the evidence . . . could not justify us in reversing the judgment founded on the verdict of the jury that heard and saw all the witnesses as they gave their testimony'. . . . (c) Defendant has specified some particular changes in the record which, he says, the trial judge should have allowed. The unimportance of these matters is apparent for, had the proposed changes been allowed, the effect of the

record and the result of an appeal would have been in no way affected. (d) Defendant asserts that sarcastic statements of the prosecuting attorney during the trial have been omitted or 'smoothed over'. There is no claim that defendant objected to these statements or requested the Court to admonish the prosecuting attorney and instruct the jury to disregard improper remarks, nor is there any claim that the remarks were so serious that their effect could not have been removed by admonishment. In only one instance was a change made in Mr. Fraser's transcription of statements of the prosecuting attorney. This change was *in the portion of the notes dictated by Mr. Perry* but not typed by his transcriber until after his death. It was requested by the prosecuting attorney. In allowing it the trial judge said, 'this is one of the matters that I do particularly recall because of the unusual character of the situation.' Even had the correction not been allowed, defendant could not on appeal maintain that the statement amounted to prejudicial misconduct, for it was clearly invited by defendant. (e) Finally, defendant claims that in the transcription of the prosecuting attorney's closing argument 'Objectionable, prejudicial matter has been weeded out . . . Abusive references to the defendant have vanished.' Defendant specifies only two instances of such asserted inaccuracies. He says, 'Statements that "five to life means nothing to Chessman — life means nothing to Chessman" are abandoned in the transcription.' Defendant appears to be mistaken; a number of such statements appear in the transcript. And, defendant says, the transcript omits or modifies 'gross misstatements as to the law, incurable by

instruction, to the effect that life without possibility of parole doesn't mean that at all, and that the jury should and must return the death penalty because otherwise there was imminent danger the defendant again would be loosed by a lax administration of the law to prey upon society because the defendant was a cunning individual who knew the angles.' Defendant appears to be mistaken in this claim also. The transcript contains a great deal of argument in accord with the quoted statements, and the language of the transcript is no more temperate than that quoted." (Pages 462-465.)

**C. Any alleged denial of due process by virtue of the fact that appellant was not present at the settlement of the record in the State court has been waived.**

Appellant asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the State court. Petitioner's contention in the State court concerning representation of counsel at the settlement proceedings was not that he was not permitted to have counsel of his own choosing, or appointed counsel to represent him in these hearings, but simply that he should have been allowed to appear personally in the proceedings. To the extent that his present contention is different he has waived the contention. Appellant did participate to the extent that he prepared a long list of objections to the proposed record.

As this court in its decision of *Chessman v. Teets,* 221 Fed.2d 276 at 278 stated:

". . . Chessman also contends that he was denied effective representation of counsel. He initially

had counsel whom he relieved on March 12, 1948, the day he entered his pleas of not guilty. Thereafter he litigated until the instant proceedings in propria persona, repeatedly refusing proffered counsel at his criminal trial and in subsequent proceedings. On one of the occasions when he refused proffered counsel he stated to the court: 'I think I am a good enough lawyer.' The court then asked him, 'You don't want to trust it to a lawyer? Chessman responded: 'I don't want to do it.' Chessman finally agreed to allow an attorney to act merely as a legal adviser. Nowhere in his application does he allege that he demanded counsel after his persistent refusals of such aid. Chessman waived his right to counsel and is now precluded from urging denial of his constitutional right upon this ground."

As pointed out above, appellant's contention has never been that he was deprived of counsel at proceedings to settle the record, but his contention was that he was his own counsel and he must be allowed to be present. If his contention now is that he was deprived of the right to be represented by counsel at these hearings he has waived the objection by failing to raise the objection on appeal in the State court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

"Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear per-

sonally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts to present legal arguments. Neither reason, public policy, nor any express provision of law require defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendant who is represented by counsel. The judges of the Superior Court before whom he appeared carefully and repeatedly explained to him that his rights and privileges as a prisoner could not be enlarged by his decision to represent himself. In the trial Court he was repeatedly offered and refused counsel, and he has refused to accept appointment of counsel to represent him before this Court because counsel who volunteered to represent him could not agree to his 'condition he can continue in pro. per. with any legal action or stipulation . . . requiring co-signature of Chessman and (counsel).' In these circumstances he cannot complain that he has been prejudiced by the fact that he has not, since his conviction, been allowed to appear personally in court." (Volume 467.)

This is a reasonable rule of procedure and thus not violative of due process. In fact a like rule applies to federal prisoners who file appeals or other legal pro-

ceedings in federal courts after conviction and confinement.

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## III.

**THE TRIAL COURT GAVE THE APPELLANT A FULL AND FAIR HEARING; THE COURT PROPERLY RULED ON THE EVIDENCE AND MOTIONS SOUGHT BY PETITIONER.**

Appellant has enumerated many objections to the proceedings in the District Court. Some are completely unjustified and based upon a distortion of the proceedings below. Nevertheless, each such contention shall be discussed in this brief.

**A. The District Court properly exercised its discretion in refusing to permit the petitioner to take depositions when the request was first made four days after the commencement of the trial.**

Appellant complains that the District Court grossly abused its discretion in not permitting petitioner to take depositions and in the issuance of subpoenas for the production of certain witnesses.

It should appear clear that the District court had no power to issue subpoenas for the production of witnesses in Los Angeles.

Appellant filed a motion for an order for issuance of subpoenas and process for the taking of depositions on January 19, 1956. (CT 160-166.) This was four days after the actual trial of the matter had commenced, and well over a month after the return to the writ had been filed and the matter set for trial. Under these circumstances the District judge properly refused the issuance of the requested process.

Furthermore, under section 2246, 28 U.S.C., petitioner could have secured affidavits prior to trial and offered such affidavits in evidence. Petitioner did not do so.

**B. The District Court's rulings on the evidence were proper and in this regard appellant has raised several false issues.**

(1) Appellant's contention concerning the refusal of the District court to permit the accuracy of the transcript to be challenged at the trial is completely unsupported by the record.

Appellant complains that the District court refused to permit the accuracy of the transcript as prepared by the substitute court reporter to be tested and refused to permit the question of the decipherability of the notes to be resolved.

Appellant, in support of his contention, points to certain statements by the District court. Said complaint by appellant, however, is misleading. Appellant has not made one reference to the exclusion of evidence which he offered on the subject of the accuracy and decipherability of the notes. He does not point to any rulings, because there was no evidence offered on this subject by appellant. Also, he does not object to the ruling on any particular question put to the witnesses, Fraser and Burdick, who testified as to the accuracy and decipherability of the notes.

Indeed, in the preliminary stages in December, prior to the trial, petitioner's counsel asserted that their expert had found "hundreds" of errors in the transcript (pretrial RT 201-202. However, this witness

was not offered on the subject and no ruling as to the admissibility of his testimony was necessary. Perhaps the witness was not offered because if he were able to find "hundreds" of errors, it would indicate that he was able to decipher, and in fact could accurately read, the notes in order to determine the correct transcription from the alleged erroneous one.

Indeed, the record establishes that the District court offered to put the substitute court reporter in his chambers in order to permit him to work on the transcription of a page of the original notes (see RT 281-292:21.) Petitioner did not avail himself of this offer. Furthermore, the witness read the substance of p. 70-73 of the notes in court. (RT368.)

(2) The trial judge did not preclude the appellant from ascertaining whether the Deputy District Attorney had knowingly misrepresented to the appellant that he would be produced in court at the time of the settling of the record.

The trial court was correct in ruling that any misstatement made as to the place of the delivery of the transcript was immaterial. As long as appellant received a copy of the proposed transcript in time to prepare objections, it would appear any representation concerning the place of delivery would appear to be immaterial. In fact, the deputy district attorney did answer the question in dispute later in the proceeding. (RT 541-544; 543:6; 544:3.)

(3) Contrary to the contention of appellant, the trial court did not exclude hospital records and arrest

reports referring to the substitute court reporter, though the District Court would have been correct in so ruling had such evidence been offered.

Appellant raises a false issue in his contention that the District Court precluded him from offering arrest reports and hospital records concerning the substitute court reporter. Such issue was false because no such evidence was offered and no such ruling was necessary. Appellant sought an order for the production of such records but did not offer them. (RT 912.)

The District Court, however, would be correct in ruling that the hospital records and arrest reports are irrelevant to any issue of fraud and corruption in the case.

Likewise, the contention concerning the refusal of the trial court to permit questions concerning the hospital records and arrest reports is without substance. It would, perhaps, be proper to show that the substitute court reporter was intoxicated while actually working on the transcript, or that he was intoxicated while a witness in this proceeding. Compare *People v. Lionberger,* 19 Cal.App.2d 284; *People v. Figueroa,* 160 Cal. 80.

The hospital records referred to were clearly irrelevant since they were records of hospitalization of the substitute court reporter in 1953, three years subsequent to the date of the transcription. Likewise, the arrest reports were irrelevant since they did not establish that the substitute reporter was intoxicated while actually working on the transcript. It is submitted that even if it were established that he was intoxicated

while working on the transcript, it would not necessarily have a bearing on the issue of fraud and collusion.

**C. The court was most liberal in granting time to the petitioner in which to prepare for trial.**

In December, 1954, petitioner filed a *verified* petition swearing that the substitute court reporter, deputy district attorney and the trial judge entered into a fraudulent and corrupt arrangement to procure a fraudulent transcript for the use of the California Supreme Court. Presumably petitioner stood ready and able to prove those very serious charges at that time. The petition contains a statement that "said persons have stated that they are willing to testify to facts germane to this matter under oath pursuant to subpoena". (CT 22.)

On November 30, 1955, after a hearing on the question of fraud was ordered by the U.S. Supreme Court, appellant's counsel demanded the issuance of a writ of habeas corpus. (Pretrial RT 32.) At this same time petitioner's counsel insisted that petitioner was ready and able to proceed to trial immediately. (Pretrial RT 20:8; 32:24.) At petitioner's request the writ was issued returnable December 8, 1955. The trial was set for January 9, and later continued to January 16, 1956.

Thus the trial was held well over a month after the return to the writ was filed, when, in fact, the statute contemplates an immediate trial. Sec. 2243, title 28 of the U.S. Code provides that "When the writ or order

is returned, a day shall be set for hearing, not more than five days after the return, unless for good cause additional time is allowed." The statute contemplates an immediate trial on the sworn statements of the petition, which would become the traverse to the return. In the light of petitioner's initial insistence that he was ready for trial, the setting of the hearing at a period of a month and a half from the date was more than a liberal allowance by the trial court.

Petitioner also contends that his time to prepare was inadequate due to the facilities at the prison and the interference with his preparation by the prison authorities. He alleges that the affidavits filed by himself and other persons in the pretrial proceedings concerning the conditions at the prison were unanswered by counter-affidavits. Most of these proceedings were had without notice and due to the shortness of time counter-affidavits were unable to be prepared. (See pre-trial RT 120:10.)

It should be noted, however, that on December 21, 1955, Mr. Davis and Miss Asher had elected to use but 12 hours and 25 minutes out of a possible 104 hours available to them under the order of the court. (Pretrial RT 119:13.)

Furthermore, insofar as the prison guards looked at the papers passed between Chessman and his counsel, the Warden testified that the guards did not know the difference between legal papers of one kind or another. They simply looked in order to determine whether the paper was part of a manuscript of a book or a legal document. (See pre-trial RT 154:13-17.)

Furthermore, on December 30, 1955, the District Court made the unprecedented offer to counsel that the petitioner might be transferred to the Federal authorities at Alcatraz, and set out in detail the availability of facilities to petitioner for consultation with his counsel and other persons. (See pre-trial RT 186:20-189.) This offer was not accepted.

**D. The court was without authority to order the photostating of the shorthand notes; the original notes were available for the exclusive use of petitioner's agents in the clerk's office for one month prior to the trial.**

Appellant contends that the District Court prejudicially abused its discretion in refusing to grant a motion to have the deceased reporter's shorthand notes photostated and furnished to appellant without cost. He bases his contention on 28 U.S.C. § 2250. This section provides as follows: "If on any application for a writ of habeas corpus order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending".

This statute was designed to apply to copies of indictments, minute orders, and other documents and records of the trial court where the trial court was a federal court.

It is doubtful whether this section was intended to apply to exhibits filed in evidence in a habeas corpus action. It certainly does not apply in the present case

where the shorthand notes at the time of the motion had been placed in the custody of the court prior to trial for the convenience of petitioner. Such notes were not filed either as records or as exhibits.

Certainly there was no prejudice in any event, since the notes were impounded on December 16, and the motion for photostating copies was first made on January 9, 1956, one week before the trial was to commence.

When the question of placing the notes in the custody of the clerk first arose it was agreed that they would be in the custody of the clerk for ten days and then would be returned to southern California. (Pretrial RT 64.) Petitioner's counsel was fully in agreement with that arrangement and in fact suggested it. (RT 64:5.) When the notes were placed in the custody of the clerk of the court, respondent stipulated that they might be available in northern California for the whole period, even though such a procedure was distinctly disadvantageous to respondent since it required his witness to use photostats in place of the originals.

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## IV.

**THE DISTRICT COURT PROPERLY PERMITTED THE PROSECUTOR TO APPEAR AS CO-COUNSEL FOR RESPONDENT. IT IS DOUBTFUL WHETHER THE DISTRICT COURT COULD HAVE PREVENTED HIM FROM SO APPEARING.**

After having the allegations of fraud and collusion against the prosecutor soundly repudiated by the District Court, petitioner now makes another attack on the

prosecutor for appearing as co-counsel. The contention is framed in terms of an abuse of discretion by the District Court in permitting the prosecutor to appear as co-counsel.

There is no dispute that the prosecutor, Deputy District Attorney J. Miller Leavy, was admitted to the Bar of California and fully qualified to be admitted to practice in the District Court. It is doubtful whether the District Court could have prevented the statutorily designated counsel for the warden from appearing in court. Such appearance in this case presents no ethical problem for two reasons. First the prosecutor did not comment on his own evidence, or, for that matter, did he comment on any evidence. Secondly, although he did render invaluable assistance to the Attorney General, this was not necessarily a matter of choice with the prosecutor.

Section 12550 of the California Government Code provides as follows: "The Attorney General has direct supervision over district attorneys of the several counties of the State. . . ." Thus, since the Deputy District Attorney was requested to assist the Attorney General, it appears that under the State law neither the District Attorney nor the Deputy could refuse such assistance. Appellant's attack on the Deputy District Attorney and the District Court ruling is unfounded in fact and in law.

## V.

**THE STATE OF CALIFORNIA WAS NOT A PARTY TO THE HABEAS CORPUS PROCEEDING; THE DISTRICT COURT DID PERMIT THE PETITIONER TO CALL SEVERAL WITNESSES, INCLUDING THE SUBSTITUTE COURT REPORTER, THE PROSECUTOR AND THE JUDGE AS ADVERSE WITNESSES.**

The State is not a proper party to a habeas corpus proceeding in a Federal District Court and to so join the State as a party would be a violation of the Eleventh Amendment of the United States Constitution.

The theory sustaining habeas corpus proceedings in Federal courts where a state prisoner is involved has always been that if the petitioner is being detained in violation of his constitutional rights, the state officer so detaining the petitioner is acting beyond his authority as a state officer.

The State of Pennsylvania expressly attacked habeas corpus proceedings as unconstitutional in violation of the 11th Amendment in the case of *Ex rel. Elliott v. Hendricks,* 213 Fed.2d 922, on the ground that the proceeding was a suit against the state in violation of the 11th Amendment. The court, however, stated:

> "But we think to argue that the habeas corpus proceeding is a suit against Pennsylvania is not an accurate way to describe its nature . . . the writ proceeds against the custodian . . ."

Likewise see the statement in *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 at 689, 690 and *Ex parte Young,* 209 U.S. 123, 167-168, both relying on the theory that the act of the officer against

whom the relief is sought is beyond the officer's power and thus not the conduct of the state.

Petitioner claims that he was deprived of the right to call the prosecutor, the court reporter, the trial judge and others as adverse witnesses. The fact of the matter is that the court did permit the petitioner to call several witnesses as adverse witnesses. The court permitted the examination of several witnesses as if they were under cross-examination, e.g. the substitute court reporter. (RT 166-444.) The question of the right to impeach these witnesses was never raised in the proceedings since petitioner did not attempt to do so. Certainly the court permitted contradiction of these witnesses. The petitioner's testimony contradicted them in several respects.

This question raised by the appellant is for the large part purely hypothetical.

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## VI.

**THE DISTRICT COURT RULED CORRECTLY IN STRIKING THE AFFIDAVIT OF PREJUDICE AS INSUFFICIENT AND UNTIMELY. THE RECORD ESTABLISHES THAT THE TRIAL COURT AFFORDED PETITIONER A FULL HEARING AND WAS VERY FAIR AND VERY PATIENT.**

Appellant contends that the judge incorrectly struck the affidavit of prejudice on the ground that it was untimely and insufficient. He further alleges that the procedure used as to the affidavit of prejudice was incorrect and alleges that the judge was in fact biased.

It is proper for the judge before whom an affidavit of bias or prejudice is filed to determine whether or not such affidavit is legally sufficient, and if insufficient to refuse to disqualify himself. *U. S. v. Valenti,* 120 Fed. Supp. 80. Appellant's contention that the judge against whom the affidavit of bias or prejudice is filed must permit another judge to pass on the sufficiency of the affidavit is unsupported by any decisions.

The District Court correctly ruled that the affidavit was untimely. The statute, 28 U.S.C. 144, provides:

> "The affidavit . . . shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

The petition for writ of habeas corpus was originally filed in December 1954 in the United States District Court and assigned to Judge Goodman. A hearing was ordered in the matter by the United States Supreme Court in the Fall of 1955. It has been, and is, the practice of the District Court to assign such matters to the judge originally participating in the proceeding. On November 30, 1955, petitioner's counsel was expressly informed that Judge Goodman was assigned to the hearing in this matter. At that time there was innuendo on the part of counsel that the judge should disqualify himself. (Pretrial Rt. 7-12; 19:7-25.) Nevertheless, an affidavit of prejudice was not filed until approximately one month later, December 29, 1955. This was 30 days after petitioner was expressly informed that Judge Goodman would handle the matter and approximately ten days prior to the time then

set for trial. No extended discussion of the timeliness of said affidavit should be necessary.

Likewise, the district judge correctly ruled that the allegations of the affidavit were insufficient to show personal bias and prejudice. Such affidavit was based on no more than a mere opinion of the judge on a matter of law and an adverse prior ruling, which ruling was based upon a decision of this court. These allegations fall far short of a showing of personal bias or prejudice against one party or for the other party necessary to disqualify a judge. See *U. S. v. Valenti,* 120 Fed. Supp. 80; *Price v. Johnson,* 125 Fed.2d 806 (9 Cir., 1942); *Tupper v. Kerner,* 186 Fed.2d 79, 84 (7th Cir., 1950).

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## VII.

### THE DISTRICT COURT PROPERLY DECLINED TO DECLARE APPELLANT'S RIGHTS UNDER HIS CONTRACT WITH COUNSEL AND HIS RIGHT TO MANUSCRIPTS.

28 U.S.C. §2201 grants the court power to declare the rights of parties in a case or controversy within its jurisdiction. Neither the Director of Corrections, whose regulation concerning prison manuscripts, nor the State of California were parties to the habeas corpus action. Thus the proper parties were not before the court. It would appear improper to declare the right of petitioner insofar as they directly affected parties not before the court.

Secondly, if there is any controversy over the right of the petitioner to obtain his manuscripts, the controversy involves a question of State law. Petitioner asserts that he has a property right. However, the extent to which he has a right, if any, is a question of State law. It also involves the validity of the regulations of the State prison. This question should be determined in State courts. A petition has since been filed in the Marin County Superior Court and the matter partially adjudicated.

Furthermore, there is no merit in petitioner's contention that he has a right to the manuscripts. (See *U.S. ex. rel. Wagner v. Ragen,* 213 Fed.2d 294 (7th Cir., 1954). The inmate objected to the warden's refusal to permit the petitioner to register his invention in the United States Patent office, or to assign his inventions. *Siegel v. Ragen,* 180 Fed.2d 785 (7th Cir., 1950). The case was concerned with allegation that the warden had deprived the prisoner of property without due process of law. Also see *Stroud v. Swope,* 187 Fed.2d 850 (9th Cir., 1951). In that case the court held that an inmate of the federal prison was not entitled to carry on business affairs representing efforts to secure publication of a book or books, which he claimed to have been preparing while in prison.

## CONCLUSION.

We respectfully submit that the judgment of the District Court discharging the writ and remanding the custody of the appellant to the warden be affirmed.

Dated, San Francisco, California,
June 22, 1956.

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